

**BEFORE THE HEARING EXAMINER
FOR SKAMANIA COUNTY**

In the Matter of the Application of)	NO. SHR-19-01
)	
PacifiCorp)	Swift Reservoir Spillway
)	Access Improvements
)	
For Shoreline Substantial Development)	FINDINGS, CONCLUSIONS, AND
<u>Permit and a Shoreline Variance</u>)	DECISIONS

SUMMARY OF DECISION

The request for approval of a shoreline substantial development permit and a shoreline variance to construct access improvements at the spillway of the Swift No. 1 Dam, including permanent steel stairs, platforms, and ladders, is **GRANTED** subject to conditions and subject to future review and approval of the shoreline variance by the Washington State Department of Ecology.

SUMMARY OF RECORD

Requests

PacifiCorp (Applicant) requested approval of a shoreline substantial development permit (SSDP) and a shoreline variance to construct access improvements at the spillway of the Swift No. 1 Dam, located at the west end of Swift Reservoir in Skamania County. The improvements would include permanent steel stairs, platforms, and ladders to provide for worker inspection, maintenance, and repair of the spillway.

Hearing Date

The Skamania County Hearing Examiner held an open record hearing on the requests on May 20, 2019.

Testimony

The following individuals presented testimony under oath at the open record hearing:

1. Alan Peters, Assistant Planning Director, Skamania County
2. Brett Horton, PacifiCorp

Exhibits

The following exhibits were admitted into the record:

1. Community Development Department Staff Report, dated May 9, 2019
2. Application materials, including the following:¹
 - Critical Area Water Resource Buffer Variance Application Supplemental Information

¹ Citations to pages within Exhibit 2 will be to the page numbers assigned by County staff (at the tops of the pages) and not to the page numbers of the individual documents.

- JARPA Form
 - Site Plan and Layout Plans
 - SEPA Environmental Checklist
 - Letter from Jessica Kimmick, PacifiCorp
3. Notice of Public Hearing (as published)
 4. Notice of Public Hearing (as mailed to agencies and adjacent property owners)
 5. SEPA Determination of Non-significance, issued April 11, 2019

Upon consideration of the testimony and exhibits admitted in the record, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicant requested approval of an SSDP and a shoreline variance to construct access improvements at the spillway of the Swift No. 1 Dam, located at the west end of Swift Reservoir in Skamania County (Parcel No. 07-05-28-0-0-0108-00). The improvements would include permanent steel stairs, platforms, and ladders to provide for worker inspection, maintenance, and repair of the spillway. The application was determined to be complete on March 12, 2019. *Exhibit 1, page 1; Exhibit 2.*
2. The Swift No. 1 Dam was constructed in 1958. The spillway, which connects the Swift Reservoir with the historic Lewis River channel, allows the Applicant to control water levels in the reservoir. Other development in the vicinity consists of hydroelectric power infrastructure operated by the Applicant and by the Cowlitz County PUD. *Exhibit 1, pages 1, 6, and 7.*
3. Current access structures on the spillway (a stairway on the south side of the spillway and a central ladder) do not reach all work areas; workers must access the spillway from the bottom or rappel down to work areas. The proposed structures would include the following:
 - New staircase and platform on the north side of the spillway;
 - Extension of existing staircase on south side of spillway to new platform;
 - New stairway down front face of center spillway pier, with platforms on each side at the bottom of the stair and a retractable ladder down to spillway slab; and
 - Railings, landings, and toe kicks on structures per safety regulations.*Exhibit 2, pages 18 and 36; Exhibit 1, page 2.*
4. Because the spillway is necessarily located within the water, the proposed improvements would be located within 50 feet of the Swift Reservoir and Lewis River shorelines, which places the proposed improvements within the jurisdiction of the Shoreline Management Act and within required shoreline buffers. The County's Shoreline Master Program

designates the affected shoreline area as a Conservancy shoreline environment. Water control devices and structures are permitted uses within the Conservancy environment. However, the minimum required shoreline buffer is 50 feet. A variance is required for the proposed improvements. *Exhibit 2, pages 10 and 18; Exhibit 1, pages 1, 2, and 7.*

5. As of September 2017, projects within the Shoreline Management Act jurisdiction that are valued at less than \$7,047 are exempt from substantial development permits. The approximate fair market value of the project is \$200,000; it is not exempt and requires SSDP approval. *Exhibit 1; Exhibit 2, page 8.*
6. The proposed access structures would be bolted to the existing concrete spillway structures, with minor excavation and rock removal within the embankment fill required for those structures not directly on top of concrete. No vegetation removal would be required. *Exhibit 1, page 2 and Exhibit 2, pages 8, 12, 36 and 37.*
7. The tallest height of the proposed structures would be four feet, for the staircase railings. *Exhibit 2, page 33.*
8. The Applicant proposes to place a barrier (such as a coffer dam) at the downstream end of the spillway to catch any debris that might fall during construction. The spillway would be closed, and the work performed in dry conditions. *Exhibit 2, page 10; Brett Horton Testimony.*
9. The Swift No. 1 dam is eligible for the National Register of Historic Places. The Applicant consulted with the Department of Archaeology and Historic Preservation, which concluded that the project would have no adverse effect on the historic district. *Exhibit 2, pages 36-37.*
10. There is no public access to the spillway area. *Exhibit 2, page 33.*
11. Consistent with the requirements of the State Environmental Policy Act (SEPA), Skamania County acted as lead agency for review of the environmental impacts of the proposal. The County issued a determination of non-significance (DNS) on April 11, 2019. *Exhibit 5.*
12. Notice of the public hearing was mailed to adjacent landowners within 300 feet. Notice was also posted on the Community Development Department's webpage on April 10, 2019 and published in The Skamania County Pioneer on April 10, 2019 and April 17, 2019. *Exhibit 1, page 2; Exhibits 3 and 4.*
13. There was no public or agency comment submitted in response to the application. County Planning Staff recommended approval of the SSDP and variance, subject to conditions requiring that the Applicant and all contractors perform as follows: stop work if cultural resources are discovered during construction; replant any disturbed vegetation; restore any disturbed banks to pre-project configuration; store fuels and chemicals in a manner that prevents entry into water, and install a barrier to prevent debris from entering

the Lewis River; and remove construction debris from shoreline area after project completion. The Applicant did not object to these conditions. *Exhibit 1, pages 17-18; Testimony of Alan Peters and Brett Horton.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline permits pursuant to SCC 20.20.010.

Criteria for Review

Substantial Development Permit:

Pursuant to Skamania County Code 20.20.020.A, the Hearing Examiner shall grant a substantial development permit only if the proposal is consistent with:

1. The policies and procedures of the Shoreline Management Act;
2. The provisions of Chapter 173-14 [now 173-27] WAC; and
3. The Skamania County Shoreline Master Program.

Shoreline Management Act

The policy of the Shoreline Management Act is set forth in RCW 90.58.020 as follows:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment or are unique to or dependent upon use of the state's shoreline. ...

Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

(1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.

(2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-150

(2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

(1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

Skamania County Shoreline Master Program

Shoreline Policy Statements for Use Activities

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2. Archeological Areas and Historic Sites

Archaeological areas, ancient villages, military forts, old settlers' homes, ghost towns, and trails were often located on shorelines because of the proximity of food resources and because water provided an important means of transportation. These sites are nonrenewable resources, and many are in danger of being lost through present day changes in land use and urbanization. Because of their rarity and the educational link, they provide to our past these locations should be preserved.

Policy Statements:

- a. Consult with the Skamania County Historical Society to identify archeological areas and historic sites. All archeological and historic sites should be identified and noted in priority. Where possible, such sites should be permanently preserved for scientific study and public observation.
- b. Shoreline permits, in general, should contain special provisions which require developers to notify local governments if any possible archeological data are uncovered during excavations. In areas known to contain archeological data, local governments should attach a special condition to a shoreline permit providing for a site inspection and evaluation by an archeologist to ensure that possible archaeological data area properly salvaged. Such a condition might also require approval by local government before work can resume on the project following such an examination.
- c. Development which might destroy an archeological or historic site may be delayed until the appropriate agency or organization can be given the opportunity purchase the site or obtain the desired data. Such delays will not be prolonged if little or no interest is shown, or if the group wanting protection is dilatory.

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20. Utilities

Utilities are services which produce and carry electric power, gas, water, sewage, communications and oil. At this time the most feasible methods of transmission are by pipes and wires. The installation of this apparatus necessarily disturbs the landscape but can be planned to have minimal visual and physical effect on the environment.

Policy Statements:

- a. Whenever these facilities must be placed in a shoreline area, the location should be chosen so as not to obstruct or destroy scenic views. Whenever feasible, these facilities should be placed underground, or designed to do minimal damage to the aesthetic qualities of the shoreline area.
- b. Utilities should be located to meet the needs of future populations in areas planned to accommodate this growth.
- c. To the extent feasible, public and private utilities should attempt to incorporate major transmission line rights-of-way on shorelines into their program for public access to and along water bodies.
- d. Upon completion of installation/maintenance projects on shorelines, banks should be restored to pre-project configuration, revegetated and provided maintenance care until the newly planted vegetation is established.

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21. Wildlife

Hunting and fishing are a major recreational activity for residents of Skamania County. Also, a large number of nonresidents from other areas of the state and neighboring Oregonians visit the county to hunt and fish. The wildlife resource of the county also provides a source of enjoyment for those who desire to observe and photograph wildlife. Since wildlife (which include the fish in lakes and streams) constitutes a major use of the county's shorelines, the Shoreline Advisory Committee considers it necessary for the Master Program to include wildlife as a shoreline use. And, to develop policies which give consideration to the habitat requirements of wildlife in order to maintain and enhance this valuable natural resource.

Policy Statements

- a. Identify rare and endangered wildlife species habitat along shorelines and reserve these areas for wildlife use.
- b. Winter range is the limiting factor for wildlife populations and should be protected from intensive development that would be detrimental to wildlife.
- c. Nesting sites for waterfowl, hawks, owls and eagle species should be protected from shoreline uses which would render the habitat unsuitable for nesting areas.
- d. In reviewing substantial development permits, recognition should be given to the possible detrimental impact such developments may have on wildlife resources, including the fisheries resource, especially spawning areas for anadromous fish.

Conservancy Environment Regulations

The following are the applicable conservancy environment regulations for the proposed development.

1. Purpose: The Conservancy Environment is intended to protect, conserve and manage existing natural resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization.
2. Uses: The primary uses permitted in the Conservancy Environment are those uses, which can utilize resources on a sustained yield basis. Such uses include diffuse outdoor recreation activities, timber harvesting, agricultural uses, and low-density residential and other related uses. Shoreline uses permitted within the Conservancy Environment: Water control devices and structures
....
4. Setback: All buildings and structures shall be setback at least 50 feet from the ordinary high water mark.

5. Building height: There shall be a 35 foot maximum building height for all structures.

...

7. Restoration: Same as for the Urban Environment except for timber harvesting, which shall comply with the Renewable Resource Regulations. The Urban Environment states: All shoreline areas, which are disturbed as a result of shoreline development, shall be landscaped, except those areas along the water line where shoreline protection works are specifically allowed by the shoreline development permit. All areas unpaved or reserved for future development shall be either entirely landscaped or screened from public view. Landscaping may consist of trees, shrubbery and grass. All landscape development should be designed particularly to enhance the building scale and form and be compatible with other nearby landscaping. New plantings shall be of such size and density that they are initially effective. The plantings shall be so maintained that they will blend into the urban area in the shortest possible time. Where development shall cause the removal of all debris, litter, dilapidated buildings and structures and old machinery. This removal and restoration shall occur on all of the parcel of property and as far into the water as abandoned piling or other debris may extend within the property ownership. The property owner shall maintain the shoreline area in a neat and orderly manner and not dispose of litter junk or abandon machinery within the shoreline area. Timber harvesting shall comply with the Skamania County Shorelines Master Program Renewable Resource Regulations.

The Use Regulations

The Use Regulations are intended to govern the manner in which the particular use or type of development is placed in each environment so that there are no effects detrimental to achieving the objectives of the particular environment.

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Construction and Operations Regulations

The following regulations cover the construction practices that must be observed for substantial developments.

1. No construction equipment shall enter any shoreline body of water, except as authorized under the terms of a substantial permit.
2. Vegetation along the water shall be left in its natural condition unless the substantial development permit allows otherwise.
3. During construction care will be taken to assure that waste material and foreign matter are not allowed to enter the water.

4. All fuel and chemicals shall be kept, stored, handled, and used in a fashion which assures that there will be no opportunity for entry of such fuel and chemicals into the water.
- ...
9. All construction debris such as fuel and oil containers and barrels and other miscellaneous litter shall be removed from the shoreline area. No equipment shall be abandoned within the shoreline area.

Nonconforming Structures and Uses

1. Structures: All structures which were built prior to the effective date of this Master Program and all structures for which a substantial development permit has been issued prior to the effective date of this Master Program but which do not conform to the goals, policy statements and regulations contained herein, may continue to exist or be completed according to the following provisions:
 - (a) No nonconforming structure may be expanded except in conforming to these regulations.
 - (b) Nonconforming structures which are destroyed beyond 90% of their value, as that value was last determined by the County Assessor, shall not be restored.
 - (c) Nonconforming structures may be maintained and improved however such maintenance and improvement shall not have the effect of expanding the size or bulk of the structure.
 - (d) Uses within nonconforming structures may be changed to other uses.

Shoreline Variance:

The proposal involves work that is both landward and waterward of the ordinary high water mark. Pursuant to SCC 20.20.040.C, shoreline variances for projects located landward of the ordinary high water mark may be authorized, provided that the applicant can demonstrate all of the following:

1. That the strict application of the bulk, dimensional or performance standards set forth in the Master Program precludes or significantly interferes with a reasonable permitted use of the property;
2. That the hardship described in subsection C1 of this section is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the Master Program, and not, for example, from deed restrictions or the applicant's own actions;
3. That the design of the project will be compatible with other permitted activities in the area or qualify as a prior nonconforming use, and will not cause adverse effects to adjacent properties or the shoreline environment designation;
4. That the requested variance will not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief;

5. That the public interest will suffer no substantial detrimental effect.

Pursuant to SCC 20.20.040.D, shoreline variances for projects that will extend waterward of the ordinary high water mark may be authorized, provided that the applicant can demonstrate all of the following:

1. That the strict application of the bulk, dimensional or performance standards set forth in the Master Program precludes a reasonable permitted use of the property;
2. That the hardship described in subsection D1 of this section is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the Master Program, and not, for example, from deed restrictions or the applicant's own actions;
3. That the design of the project will be compatible with other permitted activities in the area, and will not cause adverse effects to adjacent properties or the shoreline environment designation;
4. That the requested variance will not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief;
5. That the public rights of navigation and use of the shorelines will not be adversely affected by the granting of the variance;
6. That the public interest will suffer no substantial detrimental effect.

Pursuant to SCC 20.20.040, shoreline variance decisions are also guided by the following:

- A. The purpose of a variance permit is strictly limited to granting relief to specific bulk, dimensional or performance standards set forth in the Master Program where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the Master Program would impose unnecessary hardships on the applicant, or thwart the policies set forth in RCW 90.58.020.
- B. Variance permits should be granted in a circumstance where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances extraordinary circumstances should be shown and the public interest shall suffer no detrimental effect.
- ...
- E. In the consideration of any variance permits, cumulative impacts of additional requests for similar actions must be reviewed and considered. The total, cumulative effects of approved shoreline variances should remain consistent with the policies of RCW 90.58.020 and should not produce substantial adverse effects to the shoreline environment.

Conclusions Based on Findings

1. With conditions of approval, the criteria for a substantial development permit are satisfied.
 - a. The proposal is a “reasonable and appropriate use” of the shoreline consistent with RCW 90.58.020. The spillway is a water-dependent use, and the proposed access improvements would have no adverse effect on public health or the health of the aquatic environment. *Findings 1, 2, 3, 6, 8, 11 and 13.*
 - b. The proposal is consistent with the regulations of the Shoreline Management Act, in that it is being reviewed under the applicable SSDP and variance criteria and will be conditioned for consistency with the Master Program and with the 21-day waiting period required by WAC 173-27-190. No structure of more than 35 feet above average grade is proposed. *Findings 4, 5, 7, and 13.*
 - c. With approval of the shoreline variance from the 50-foot Conservancy buffer requirement, the proposal is consistent with the Skamania County Shoreline Master Program. The use is allowed in the Conservancy Environment. The project has been evaluated for potential impacts to historic places, and the conditions of approval include stop work and notice requirements if cultural resources are identified during construction. The access structures would not obstruct or destroy scenic views, and they would not affect wildlife. The conditions of approval address restoration requirements and construction practices. *Findings 4, 6, 7, 8, 9, 10, and 13.*
2. With conditions of approval, the proposal satisfies the criteria for shoreline variance.²
 - a. Strict application of the shoreline buffer requirement would impose unnecessary hardships on the Applicant and would thwart the policies of RCW 90.58.020 (quoted above). The dam is a water-dependent use that by necessity is located within the regulated water body, and the proposed access structures are needed so that workers may inspect, maintain, and repair the spillway. *Findings 1, 3, and 4.*
 - b. The current difficulty in accessing work areas is an extraordinary circumstance supporting the variance, and the public interest would suffer no detrimental effect. The proposal would not affect the aesthetics of the shoreline or public usage of the shoreline, as the spillway is an existing structure and the public does not have access to the area. *Findings 3, 7, and 10.*

² Because the criteria for development waterward of the ordinary high water mark contained in SCC 20.20.040(D) are more restrictive than those applicable to development landward of the ordinary high water mark contained in SCC 20.20.040(C), these conclusions – beginning at 2.c - address SCC 20.20.040(D).

- c. Strict application of the shoreline buffer requirement would preclude the proposed reasonable permitted use of the property. *Findings 2, 3, and 4.*
- d. The hardship requiring the variance is related to unique conditions including the water-dependent nature and of the established use. *Findings 2 and 4.*
- e. With conditions, the design of the project would be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or to the Conservancy Environment. *Findings 2, 4, 6, 8, and 13.*
- f. The variance would not be a grant of special privilege and is the minimum necessary to afford relief. The ability to safely access a permitted use is not a special privilege. The proposed access structures would be affixed onto the existing spillway and require minimal new ground disturbance and no vegetation removal. *Findings 3 and 6.*
- g. Public rights of navigation and use of the shoreline would not be adversely affected, as the public is already precluded from use of the area. *Findings 2 and 10.*
- h. Due to the limited nature of the request (stairways and platforms to allow for maintenance of an existing spillway structure), there should be no cumulative effects. *Findings 1, 2, and 3.*

DECISION

Based upon the preceding findings and conclusions, the requested shoreline substantial development permit and shoreline variance are **GRANTED** subject to the following conditions:

1. The following procedures shall be followed if cultural resources are discovered during construction activities:
 - a. Halt construction: All construction activities within 100 feet of the discovered cultural resources shall cease. The cultural resources shall remain as found; further disturbance is prohibited.
 - b. Notification: The Applicant shall notify the Community Development Department and Native American tribal governments within 24 hours.
2. Any disturbed vegetation shall be restored and planted to its prior natural state.
3. Upon completion of the project, any disturbed banks shall be restored to pre-project configuration, revegetated and provided maintenance care until the newly planted vegetation is established.
4. All fuel and chemicals shall be kept, stored, handled, and used in a fashion which assures that there will be no opportunity for entry of such fuel and chemicals into the water. Prior

to construction, the Applicant shall install a temporary barrier to prevent construction debris or other materials from entering the Lewis River.

5. All construction debris such as fuel and oil containers and barrels and other miscellaneous litter shall be removed from the shoreline area at the conclusion of the project. No equipment shall be abandoned within the shoreline area.
6. Construction pursuant to this permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

Decided June 6, 2019.



Sharon A. Rice
Skamania County Hearing Examiner

NOTE: Pursuant to Skamania County Code 20.20.060, any person aggrieved by the granting or denial of a permit by the Hearing Examiner may seek review from the Shorelines Hearings Board, pursuant to State Statute 90.58.180. This section of state law is included in the appendix attached to the ordinance codified in this title and filed in the office of the County Clerk. (Ord. 1980-02 '7.60)